

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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ASSOCIATION OF IRRITATED  
RESIDENTS, et al.,

Petitioners,

v.

No. 02-70160

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, et al.

Respondents.

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MEDICAL ALLIANCE FOR HEALTHY  
AIR, et al.,

Petitioners,

v.

No. 02-70177

CHRISTINE TODD WHITMAN,  
UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,

Respondents.

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COMMUNITIES FOR A BETTER  
ENVIRONMENT, et al.,

Petitioners,

v.

No. 02-70191

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,

Respondent.

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## **SETTLEMENT AGREEMENT**

WHEREAS, the Association of Irrigated Residents and Communities for Land, Air & Water, petitioners in 02-70160; Medical Alliance For Healthy Air, Sierra Club, and Natural Resources Defense Council, petitioners in 02-70177; and Communities For a Better Environment and Our Children's Earth Foundation, petitioners in 02-70191; (collectively "Petitioners") seek judicial review under section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), of the final rule entitled "Clean Air Act Full Approval of 34 Operating Permits Programs in California," 66 Fed. Reg. 63,503 (Dec. 7, 2001) ("Title V Approval Rule"), promulgated by the United States Environmental Protection Agency ("EPA"), respondent in the above mentioned cases (the "Litigation");

WHEREAS, the Parties wish to effect a settlement of the Litigation without expensive and protracted litigation; and

WHEREAS, the Parties agree that judicial consideration of the Litigation should be stayed pending completion of the agreements herein;

NOW THEREFORE, Petitioners and EPA hereby agree as follows:

1. The Regional Administrator of EPA Region 9 shall sign and forward to the Office of the Federal Register a Notice of Deficiency ("NOD") no later than May 15, 2002. Such NOD will provide notice to the State of California that the 34 local air districts that received full approval of their operating permits programs under 40 C.F.R. pt. 70 ("Part 70 programs") in the Title V Approval Rule are not adequately administering or enforcing their Part 70 programs because the districts lack adequate authority to issue permits to, and assure compliance by, all major agricultural sources required to have a permit under Title V of the Clean Air Act as a result of the exemption in section 42310 of the

California Health and Safety Code, which provides in relevant part that “a permit shall not be required for . . . (e) any equipment used in agricultural operations in the growing of crops or the raising of fowl or animals . . . .”

2. No later than July 19, 2002, the Regional Administrator of EPA Region 9 shall sign and forward to the Office of the Federal Register a Notice of Proposed Rulemaking (“NPRM”) that will propose, pursuant to 40 C.F.R. § 70.10(b)(2)(i), to partially withdraw approval of those portions of the 34 Part 70 programs that relate to sources using equipment involved in the growing of crops or raising of fowl or animals that would be subject to Title V but for the state agricultural exemption (“state-exempt agricultural sources”). In such NPRM, the Regional Administrator also shall propose that EPA will implement a partial federal operating permits program under 40 C.F.R. pt. 71 (“Part 71 program”) for state-exempt agricultural sources. The NPRM shall also provide notice that EPA will impose the following permit application deadlines in the event a partial Part 71 program is put into place:

- (a) state-exempt agricultural sources that are major sources, as defined in 40 C.F.R. § 71.2, due to emissions from diesel-powered engines must submit permit applications to EPA no later than six (6) months after the effective date of the Part 71 program or May 1, 2003, whichever is later; and
- (b) all remaining major state-exempt agricultural sources must submit Part 71 permit applications to EPA no later than August 1, 2003.

No later than October 2, 2002, the Regional Administrator of EPA Region 9 shall sign and forward to the Office of the Federal Register a notice of final rulemaking taking final action on the issues proposed in the Notice of Proposed Rulemaking.

3. EPA shall act on Part 71 permit applications in the following order, starting with the largest sources first: (a) sources located in areas designated severe or extreme ozone nonattainment and serious PM-10 nonattainment, (b) sources located in all other nonattainment areas, (c) sources in attainment areas. EPA shall issue or deny a Part 71 permit to each source that submits an application pursuant to the deadlines set forth in subsections (a) and (b) of Paragraph 2 no later than December 1, 2004, except that such schedule shall not necessarily include resolution of any appeal of a permit to the Environmental Appeals Board.

4. If the final rule promulgated pursuant to Paragraph 2 partially withdraws approval of the 34 Part 70 programs, EPA retains the right to fully approve the 34 Part 70 programs in the event the State of California removes the agricultural exemption in section 42310(e) of the California Health & Safety Code, to the extent that such full approval is consistent with the Clean Air Act and 40 C.F.R. pts. 70 and 71. If the agricultural exemption is removed and EPA grants full approval to the 34 Part 70 programs before December 1, 2004, consistent with the Clean Air Act and 40 C.F.R. pts. 70 and 71, any remaining obligations identified in Paragraphs 1, 2, and 3 shall no longer apply.

5. The parties may by mutual agreement extend the dates set forth in Paragraphs 1, 2, and 3 or otherwise modify this Settlement Agreement, by written stipulation executed by counsel for the parties and filed with the Court.

6. Nothing in the terms of this Settlement Agreement shall be construed to limit or modify the discretion accorded EPA under the Clean Air Act or by general principles of administrative law.

7. Nothing in this Settlement Agreement shall be construed to limit or modify EPA's discretion to alter, amend, or revise the regulations identified in Paragraphs 1, 2, and 3 from time to time, or to promulgate superseding regulations.

8. If EPA accomplishes the items specified in Paragraphs 1, 2, and 3, and the final rule promulgated pursuant to Paragraph 2 is substantially similar to the proposed rule, then Petitioners shall promptly stipulate to the dismissal with prejudice of the Litigation in accordance with Rule 42 of the Federal Rules of Appellate Procedure, except that Petitioners Communities for a Better Environment and Our Children's Earth Foundation shall dismiss only those portions of their case (No. 02-70191) that are related to the state agricultural exemption.

9. In the event that EPA does not accomplish one or more of the items specified in Paragraphs 1, 2, and 3, or the final rule promulgated pursuant to Paragraph 2 is not substantially similar to the proposed rule, Petitioners shall have the right to reactivate the Litigation, and that right shall constitute Petitioners' exclusive remedy. Petitioners agree to give EPA thirty (30) days notice prior to exercising their rights under this paragraph, unless providing such notice would conflict with a court-ordered schedule.

10. Except as expressly provided in this Settlement Agreement, none of the parties hereto waives or relinquishes any legal rights, claims, or defenses it may have. Petitioners specifically retain the right to bring any enforcement action in district court under Clean Air Act § 304(a)(2), 42 U.S.C. § 7604(a)(2).

11. Petitioners and EPA agree that the settlement embodied herein constitutes a fair, reasonable and full and complete settlement of all claims for attorneys fees and costs under any provision of law that the Petitioners have asserted or could have asserted in connection with the Litigation. As soon as reasonably practicable after the execution of this Agreement by the Parties, the United States shall pay \$61,205.00 to Earthjustice, \$10,491.00 to the Environmental Law and Justice Clinic, and \$15,209.50 to the California Rural Legal Assistance Foundation in full and complete settlement of Petitioners' claims for attorney's fees and costs in the above-referenced matters. The payments shall be made by electronic wire transfer in accordance with instructions provided by Petitioners.

12. The Parties to this Settlement Agreement recognize and acknowledge that the payment obligations of the United States under this Agreement can be paid only from appropriated funds legally available for such purpose. No provision of this Settlement Agreement shall be interpreted or construed as a commitment or requirement that the United States obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law. The Parties further recognize that the commitments in Paragraphs 1, 2, and 3 are subject to the availability of appropriated funds. In the event that sufficient appropriated funding is not available, the Parties shall adjust the commitments in Paragraphs 1, 2, and 3 accordingly.

13. Petitioners and EPA agree and acknowledge that final approval of this Settlement Agreement is subject to the requirements of section 113(g) of the Clean Air Act, 42 U.S.C. § 7413(g). That section requires that the Administrator provide notice of any proposed settlement agreement in the Federal Register and provide a period of at least thirty (30) days following publication to allow persons

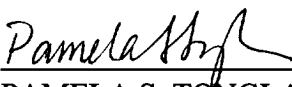
who are not parties or intervenors in the litigation to comment in writing. The Administrator or the Attorney General, as appropriate, must consider those comments in deciding whether to consent to the Settlement Agreement and may withdraw or withhold her or his consent to the Settlement Agreement if the comments disclose facts or considerations which indicate that such consent is inappropriate, improper, inadequate or inconsistent with the requirements of the Act.

14. Within 15 days of the Signature Date of this Settlement Agreement, the Administrator shall forward a notice to the Federal Register requesting public comments on this Settlement Agreement pursuant to section 113(g) of the Act. Within 30 days after the close of such public comment period, and after review of any public comments, the Administrator or the Attorney General shall determine whether to consent to this Settlement Agreement.

15. The undersigned representatives of each party certify that they are fully authorized by the party or parties they represent to bind the respective parties to the terms of this Settlement Agreement. This Settlement Agreement will be deemed to be executed when it has been signed by the representatives of the parties set forth below, subject to final approvals pursuant to Paragraphs 13 and 14.

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DATED: May 14, 2002

  
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